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No. 97-1331

Supreme Court, U.S.
FILED
MAR 17 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNION SECURITY LIFE INSURANCE COMPANY,

Petitioner,

v.

EVELYN CROCKER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

For the second time in two years, this case is again before this Court on the question of damages. On June 3, 1996, this Court granted certiorari and remanded the Alabama Supreme Court's prior judgment for reconsideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). *See* 116 S. Ct. 1872 (1996). On remand, the Alabama Supreme Court faithfully applied each of the punitive damages guidelines set out in *BMW* and reduced the damages award in this case — which had already been cut by a $2 million trial court remittitur — by an additional 50%.

Union Security continues to attack the judgment. Yet it does not even attempt to argue that the damage award in this case is excessive under the facts found by the Alabama Supreme Court. Instead, the petition for certiorari rests on (i) reckless and unfounded insults directed at the Alabama Supreme Court, which is wrongly accused of "open defiance" of this Court's decision in *BMW* (Pet. 19), and (ii) Union Security's quarrels with the

factual findings of the Alabama courts, together with a series of misstatements about the record that fly in the face of the maxim that the evidence is to be construed in favor of the verdict winner.

This is a case where state court judicial review has worked to the defendant's great benefit. The Alabama Supreme Court in the decision under review cut the punitive award by $1 million. The petition should be denied.

STATEMENT OF THE CASE

This case involves an intentional fraud by Union Security's agent, for which Union Security admits it is liable under the Alabama law of respondeat superior approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In addition to its vicarious liability, Union Security itself committed culpable acts that warrant punitive damages. Union Security adopted a deliberate corporate policy that facilitated the commission of fraudulent acts by its agents. Furthermore, it failed to provide its insureds with written copies of their policies. Such a failure made it impossible for the insureds to protect themselves against the agent's fraud.

1. *Union Security's Business.* Petitioner Union Security sells credit life insurance in conjunction with loans made by First Alabama Bank in Choctaw County, Alabama. Under this arrangement, Union Security, in exchange for a premium, pays off any outstanding loan balance in the event of the borrower's death. Union Security authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants. App. 2a; R. 302-03.[1]

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[1] References to the Appendix to the Petition for Certiorari are styled "App. __." References to the Reporter's Transcript of the trial below are styled

Taylor testified that he received "a monetary payment or incentive connected with the sale of credit life insurance." R. 540.

For credit life policies in excess of $10,000, Union Security required a "Statement of Debtor's Physical Condition." App. 2a. This health statement authorized Union Security to obtain all information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, for purposes of evaluating or underwriting the application for credit life coverage. *Id.* The statement contained nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. As a matter of company policy, Union Security issued credit life coverage only if all nine boxes were checked "no." *Id.*

2. *The Crockers.* Coleman and Evelyn Crocker were residents of Choctaw County who had been married some 31 years. They were people of modest means who lived in a mobile home. Coleman had a history of heart problems and Parkinson's disease. He had heart by-pass surgery in 1984 and an angioplasty procedure in 1988. R. 565. He died in August 1991.

In October 1990, Evelyn called Taylor about taking out a $24,000 loan with First Alabama Bank. Union Security now asserts that, "[i]n conjunction with the loan, the Crockers decided to purchase credit life insurance." Pet. 5. But at trial Evelyn Crocker's testimony was that Taylor told her (falsely) that "we would be required to have credit life," and she replied that the Crockers would accept credit loan coverage. R. 572. "He said, You must have credit life to get this loan." R. 575. The Alabama Supreme Court found that the evidence showed that Taylor's fraud "induced [the Crockers] to obtain the credit life

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"R. _." References to the Record of the clerk of the trial court are styled "Ct. R. _."

coverage." App. 21a.

3. *Taylor's Knowledge.* The Alabama Supreme Court found that "[t]here is evidence that Taylor knew that these health conditions" — Parkinson's disease and heart disease — "existed when Mr. Crocker and his wife applied to him for credit life insurance in conjunction with this home equity loan." App. 4a.

Union Security now claims that there "is a dispute of fact as to whether Taylor actually knew that Mr. Crocker indeed had suffered from heart disease." Pet. 6 n.6. Yet at trial it was undisputed that "during the years that Mr. Crocker suffered from heart disease and Parkinson's disease," App. 3a, the families had fished together, vacationed together, and dined in each other's homes. R. 492, 532-33. Taylor was a pallbearer at Coleman's funeral. R. 545. Mrs. Crocker testified that she told Taylor "a few times" about Coleman's heart disease and his angioplasty operation. R. 589. She testified that Taylor "asked me on several occasions inside of the bank how [Coleman] was doing." R. 591. "[O]nce a month" Evelyn would go into the bank and Taylor "always came out and spoke to me and he would say, 'How is Mr. Coleman today?'" R. 615. After she retained a lawyer, but before she filed suit, Taylor admitted to her that "he knew [Coleman] had had balloon surgery and everything." R. 592.

A First Alabama employee also testified that she specifically recalled a conversation in which Taylor had asked Evelyn Crocker "how Coleman was, did the procedure, his heart procedure that they had done, did it work this time" (R. 637), referring to the angioplasty performed in 1988. She further recalled on other occasions that Taylor had asked Evelyn if Coleman was doing better. R. 638. Another witness testified that Taylor admitted to him that he knew that Coleman had had heart surgery, undergone an angioplasty, and suffered from Parkinson's disease. R. 650-51. Ironically, Coleman

experienced noticeable tremors from Parkinson's disease on the very day that the application forms were signed. App. 21a.

The only contrary "evidence" was Taylor's self-serving claim in his direct testimony that, at the time he filled out the form, he had no recollection of Coleman's illness. R. 523, 544-45, 555. On cross-examination, Taylor retreated substantially from this testimony.[2]

4. *Taylor's Fraud Filling Out the Health Statement.* Union Security asserts that the evidence of Taylor's misconduct was "thin at best." Pet. 8 n.8. To the contrary: Taylor failed to request the Crockers to fill out the medical statement and failed even to ask them for medical information. Instead, he filled out the medical statement himself, R. 495, and falsified the information he put on the application. Taylor called the Crockers and told them that the papers relating to the loan — 10 to 12

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[2] Q: [Y]ou can't swear under oath that your wife didn't tell you that Coleman Crocker had heart trouble. You can't tell us that, can you?
A: At what point in time are you talking about?
Q: Any time before Coleman Crocker died.
A: (No response.)
Q: You can't tell us that, can you?
A: No.
Q: You can't tell us that, and you knew he had the nervous disorder, didn't you?
A: (No response.)
Q: Fifteeen or twenty years you had been knowing that.
A. (No response.)
Q: Hadn't you?
A: Yes.

R. 559.

Q: You asked the Health Statement after you had known that he had a nervous condition for fifteen or twenty years and after your wife had told you he had a by-pass or a heart condition.
A: Yes.

R. 560.

documents in all — were ready for them to sign. R. 575. Taylor asked absolutely nothing of the Crockers' prior health history. R. 576, 577. "He said [to Evelyn Crocker], 'you are covered with credit life in case something were to happen to you or your husband,' and he said in the event something did, if one of us was to die, then our balance at the bank would be paid off." R. 575.

When asked at trial about whether he had questioned the Crockers regarding the health statement, Taylor replied: "No sir, because if he had answered 'YES' on any, I would have discontinued the credit life." R. 509. Taylor stated that, on the other hand, if all boxes were checked "NO," the bank and Union Security would have received "some money." R. 556-57.

As the Alabama Supreme Court found, "Taylor knew that he would receive a commission from the sale of credit life insurance to Mr. Crocker, even if a future claim for the benefits was denied." App. 4a-5a. The court further found:

> With this knowledge, Taylor deliberately precompleted for the Crockers the health disclosure statement on the Crockers' application form, marking "No" beside questions that asked if Mr. Crocker suffered from heart disease or certain other illinesses. *Taylor thus intentionally falsified information on the Crockers' life insurance application*, to secure a fraudulent appoval by Union Security. He did so knowing that the Crockers were relying on the coverage to pay off the loan and to prevent the foreclosure of their home mortgage in the event either of them died. He assured them they would receive coverage, and he collected his commission when they did, knowing that their benefits would be denied if his false representations on their applications were discovered after the fact.

Id. at 5a (emphasis added).

The court concluded that "[t]he evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage." App. 20a. In addition:

> There is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.

Id. at 21a.

5. *Union Security's refusal to pay.* After Mr. Crocker's death, Union Security refused to pay benefits on the credit life insurance policy, explaining that "[h]ad full disclosure been made at the time the Health Statement was completed coverage would not have been written on this loan." Ct. R. 311. The Alabama Supreme Court found that, "[w]ithout her husband's income, and without the benefits of the coverage for which she had paid premiums, Mrs. Crocker was unable to pay off the balance on her First Alabama loan." App. 3a. "On December

11, 1991, Taylor wrote Mrs. Crocker to inform her that, because of her default on the loan, First Alabama would foreclose the mortgage on her double-wide mobile home, which was collateral for the loan." *Id.* "The foreclosure was to take place on December 20, 1991, five days before the first Christmas that Mrs. Crocker would spend as a widow." *Id.* "The foreclosure proceedings were halted only after Mrs. Crocker obtained legal counsel." *Id.*

Union Security now claims that it "informed [Mrs. Crocker] that the portion of the premium attributable to Mr. Crocker would be refunded." Pet. 7. Yet at trial Union Security's own claims manager testified that he took no steps to ensure that a refund of the insurance premium was made. After Union Security denied the claim, it closed Mrs. Crocker's file. R. 344. Its claims manager testified that "I don't see anything referring to a refund of premium in here." *Id.* He stated that he didn't know anything about whether a refund was made, when it was made, what amount should have been refunded, or whether interest was paid. R. 345 ("I did not refund the premium, so I don't know if interest was paid or not"). Union Security alleged that it instructed First Alabama to refund the premium, but it never took any steps to ensure that the refund was actually carried out.

The only reason any refund was paid was the personal intervention of the President of First Alabama, Choctaw. R. 739-40. Even then, he acted only after the instant lawsuit was filed. R. 742-43. And he refunded only *half* the premium — the portion attributable to Mr. Crocker. R. 744.

REASONS FOR DENYING THE WRIT

I. THE PETITION IS PREMISED ON FACTUAL DISAGREEMENTS WITH THE STATE COURTS BELOW

The petition is based on Union Security's allegation that the conclusions of the Alabama Supreme Court were "inaccurate" (Pet. 13); that the Court "overlooked the facts" (Pet. 13 n.12); that there was "no record basis" for the Court's decision (Pet. 23), and it was not based on "an iota of evidence" (Pet. 14).

There are of course complete answers to every one of Union Security's attempts to debate the record evidence with the Alabama Supreme Court. But the salient point is more fundamental: Union Security's own argument demonstrates that certiorari is inappropriate in this case, for unless this Court is to engage in de novo review of every damages award to examine each defendant's plea that he or she was wholly innocent and that the damages are excessive, then review is entirely unwarranted here. This case involves nothing more than factual disputes about the application of settled legal principles to a specific factbound context.

Indeed, review is particularly inappropriate for a reason Union Security seeks to bury in a footnote (Pet. 14 n.14): at trial Union Security declined to request an itemized verdict separating punitive and compensatory damages. The Alabama Supreme Court did not proceed on the assumption that the entire $1 million represented punitive damages. At the denial of rehearing in the Alabama Supreme Court, Justice Houston explained that, in light of Union Security's procedural waiver:

> I presumed, *as did every other Justice on this Court*, that the jury's general verdict included an award compensating the

> plaintiff. . . . I concluded that the jury in this case could have awarded as much as $250,000 in damages to compensate the plaintiff for her economic loss and emotional distress, and that such an award would not have been reduced by this Court, based upon the cases hereinbefore cited and others not cited. . . . Assuming such an award of $250,000, which the evidence would support, that left a $750,000 punitive damages award approved by this Court; that award represented a 3:1 ratio of punitive damages to compensatory damages.

App. 45a-46a (Houston, J., specially concurring) (emphasis added).

Justice Houston made clear that his analysis was premised entirely on Union Security's procedural default at trial:

> I would have preferred that the jury enter separate awards for compensatory and punitive damages. Ala. Code 1975, § 6-11-1. I believe that either party has a right to demand that the verdict form submitted to the jury require that. However, if no party objects to the verdict form submitted and the jury returns a general verdict, then I believe this Court must assume that the general verdict includes the maximum amount of compensatory damages that this Court would affirm.

App. 46a.

The petition for certiorari simply fails to come to grips with this ground for upholding the award — the only opinion issued by the Alabama Supreme Court on rehearing and one which purports to describe the reasoning of the entire Court. Nothing in the petition remotely shows that a modest 3:1 ratio between punitive and compensatory damages would be unreasonable in this case.

II. THE DAMAGES AWARD IS NOT EXCESSIVE

Not only does this case involves the kind of factbound application of a settled legal standard that does not warrant this Court's review, but here the state court administered the legal standard correctly. In this case, the Alabama Supreme Court faithfully applied the *BMW v. Gore* guideposts, together with the factors approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

1. Reprehensibility. The Alabama Supreme Court found that Taylor "intentionally falsified information on the Crockers' life insurance application," App. 5a, defrauding them into buying a worthless policy. "He did so knowing that the Crockers were relying on the coverage to pay off the loan and to prevent the foreclosure of their home mortgage in the event either of them died. He assured them they would receive coverage, and he collected his commission when they did, knowing that their benefits would be denied if his false representations on their applications were discovered after the fact." *Id.* "When Mrs. Crocker, newly widowed, submitted her claim for benefits under the policy, Union Security denied it, leaving her with no means to pay her debt to First Alabama. She was threatened with foreclosure of her home mortgage, only five days before the first Christmas that she would spend without her husband of 31 years of marriage." *Id.* The Alabama Court therefore concluded that "Union Security's misconduct in this case was highly reprehensible," although the court allowed that it appeared to be "an aberration." *Id.* at 6a.

a. Union Security contends that there is "no evidence from which it could fairly be concluded that Union Security did anything wrong at all." Pet. 20. This claim is both irrelevant and a mischaracterization of the record.

First, under the doctrine of respondeat superior, as upheld by

this Court in *Haslip*, Union Security's argument is irrelevant. It can be held fully liable for punitive damages based on the intentional fraud of its agent, Sammy Taylor, even if it did nothing wrong itself. *See* Ala. Code § 6-11-27 (principal's liability in punitive damages for acts of agent).[3]

"[T]he legal basis for assessing punitive damages on respondent superior grounds is well-established." *Laughinghouse v. Risser*, 786 F. Supp. 920, 925 (D. Kan. 1992). Seventy years ago, this Court made clear that punitive damages "may be assessed against the employer who, as here, is personally without fault." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 114 (1927). "The principle of respondeat superior itself and the rule of liability of corporations for the willful torts of their employees extended in some jurisdictions, without legislative sanction, to liability for punitive damages, are recognitions by the common law that the imposition of liability without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law." *Id.* at 115.

This principle was reaffirmed in *Haslip*, where this Court upheld a punitive damages award of over $800,000 against an insurer whose agent was guilty of fraud, even though the award was more than four times the amount of compensatory damages and more than 200 times the out-of-pocket expenses incurred by the insured. In *Haslip*, the agent's wrongdoing was imputed to Pacific Mutual in full, over the insurer's objections that neither it nor its local manager was aware that the agent was collecting

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[3] The jury was properly instructed that, under Alabama law, it could impose punitive damages on Union Security if (1) Union Security "knew or should have known of the awareness of the agent . . . [and] continued to employ him or used his services without proper instruction with a disregard of the rights or safety of others"; or (2) it authorized or ratified his misconduct; or (3) "the acts of the agent were calculated to or did benefit the principal." R. 915-16.

premiums contrary to his contract; that Pacific Mutual had no notice of the actions complained of prior to the filing of the complaint in the litigation; that Pacific Mutual did not authorize or ratify the agent's conduct; and that the agent's contract with the company forbade his collecting any premium other than the initial one submitted with an application. *See* 499 U.S. at 12-13. This Court found that none of these defenses rendered the damages excessive.

By definition, a corporation held vicariously liable may well have done little affirmatively wrong itself. Yet in assessing whether the damages imposed against the principal are excessive, the conduct and state of mind of its agent must be imputed directly to the principal. That is the very nature of vicarious liability. *See, e.g., Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1224 (8th Cir. 1990) ("Because [the agent's] wrongful intent is imputed to [the principal], we hold that there is sufficient evidence of intentional wrongdoing to support the punitive damages award" against a challenge that the defendant's conduct was not reprehensible enough to justify $2 million award); *Laughinghouse v. Risser*, 786 F. Supp. at 928 ("The jury found [the principal] to be vicariously liable for [the agent's] conduct. In order to consider the acts of the agent, for which [the principal] as the master was liable even in punitive damages, the jury could consider evidence relating to the nature, extent and enormity of the wrong as well as the intent of the party committing it.").

Accordingly, Taylor's deliberate fraud and wrongful intent must be imputed directly to Union Security. The misconduct here was highly reprehensible, amounting to "acts of affirmative misconduct." and "trickery and deceit." *BMW v. Gore*, 116 S. Ct. at 1599, 1601.

Union Security claims that there is no evidence that "it had authorized [Taylor] to fill out Health Statements inaccurately."

Pet. 6 n.6. But few principals ever expressly direct an agent to commit misconduct. *See* W. Page Keeton, *et al.*, PROSSER AND KEETON ON TORTS § 70, p. 502 (5th ed. 1984) ("A master cannot escape liability merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable."). Here the evidence showed that Union Security authorized Taylor to fill out the Health Statements without regard to whether they were accurate, and Union Security adopted no safeguards to ensure that the Statements were accurate. The Alabama Supreme Court found that "Union Security issued insurance to Mr. Crocker without any meaningful knowledge of his medical, and it collected premiums from him until he died on August 28, 1991." App. 5a.

b. In the decision under review, the Alabama Supreme Court understood that the damages award could be upheld on the basis of Union Security's vicarious liability. The court found it unnecessary to discuss the ways in which Union Security was itself guilty of affirmative misconduct. But in its earlier decision — which the state court certainly never disavowed or abandoned, as Union Security incorrectly suggests (Pet. 13-14) — the court detailed that wrongdoing. The Alabama Supreme Court found that "Union Security does not issue a written policy to those applicants who are accepted for coverage." App. 19a. The trial court noted that "it was undisputed" that the Crockers never received "either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased." App. 31a. Thus, "[o]ne can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth in the Statement." *Id.*

Had Union Security issued a written policy to the Crockers,

Taylor's fraud might have been exposed. Indeed, Regulation No. 28 of the Insurance Commissioner of the State of Alabama requires that "[a]ll Credit Life Insurance sold shall be evidenced by a policy, certificate or statement of insurance, which shall be delivered to the insured borrower or purchaser. . . . Said policy, certificate or statement of insurance shall set forth the amount and term of the coverage, a brief description of the coverage, including any exceptions, limitations, or restrictions." Ct. R. 253-54. The trial court in this case rejected Union Security's argument that the regulation required merely that the policy be delivered to the group policy holder — here, First Alabama — and commented that the regulation "hasn't been complied with because there wasn't any delivery to each debtor insured under the policy." R. 811. Indeed, Union Security's claims manager testified at trial that he had "been made aware, possibly," of the company's violation of Alabama law. R. 433.

Union Security's witnesses claimed at trial that they had delegated the duty to First Alabama of supplying certificates of insurance to borrowers and purchasers like the Crockers. R. 326. Yet Regulation No. 28 does not provide for the delegation of duties. It imposes an obligation on the insurer to ensure delivery of certificates. In any event, Union Security is liable for the misconduct of its agent (First Alabama). Union Security's own claims manager acknowledged that, although Union Security's records reflected that the Crockers paid a premium for credit life, they never received anything in return: "In the form of a certificate, they did not." R. 328.

c. Union Security's policies facilitated Taylor's fraud in other ways as well. Prior to an application for credit life being approved, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement. R. 444. As the Alabama Supreme Court found, "Union Security does not examine the health records of

those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine 'after the fact' whether coverage should have been issued." App. 19a. The evidence showed that the great majority of claim denials result from post-claim investigation of the health statements. R. 334, 335.

Union Security goes so far as to claim that it "was the *victim*" of insurance fraud. Pet. 20 n.17. But Union Security's own figures show that it receives between 2,000 and 6,000 health statements per month (Pet. 3 n.4) — or 24,000 to 72,000 per year — but it pays only 7,000 claims annually. Pet. 4. The vast majority of insureds, in other words, pay the premiums and never make a claim under the coverage. Union Security thus derives a great benefit from maximizing the number of policyholders, since each individually is unlikely ever to make a claim. Union Security's policy of issuing insurance while failing to investigate health conditions allows agents to defraud consumers like the Crockers who sign up for credit life policies for which they are not qualified — and for which they would in fact later be disqualified for health reasons if they attempted to assert a claim within the first year of the policy (when the incontestability clause does not apply). Union Security reaps the benefits of premiums from defrauded customers like the Crockers, who receive nothing in return. The Alabama Supreme Court explained:

> As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. *The benefits from this type of transaction lie solely*

> *in favor of the insurance company and its agent.* The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement *could prevent situations like the one in this case.*

App. 26a-27a (emphasis added and internal quotation omitted).[4]

The record shows that, by employing lax screening procedures and maximizing sales of credit life insurance, Union Security maintains unusually profitable loss ratios. "[T]he loss ratios of Union Security with First Alabama through these four years [1988, 1989, 1990, and 1991] were, respectively, 20.6%, 21.1%, 16.3%, and 17.0%." App. 23a. Expert testimony established that a 50% loss ratio was typical for other companies and represented "a more reasonable balance between the insurer and the insureds." *Id.* The facts showed that Union Security's policy redounds enormously to its own profit and that, rather than being

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[4] Union Security's claim that considering this factor would somehow be "plainly unconstitutional" (Pet. 14 n.13) is puzzling. At all relevant times, fraud has been forbidden by Alabama law, *see, e.g.*, Ala. Code § 6-5-101 through § 6-5-104 (liability for fraud); Ala. Code § 6-11-20 (liability for punitive damages), and Union Security has been on notice that it is liable in punitive damages for the acts of its agent under certain circumstances, such as those obtaining here. Whether Alabama statutes were interpreted as prohibiting post-claim underwriting at the time of the fraud in this case is not the issue. The point is that, when Taylor *did* defraud the Crockers and when Union Security's lax procedures *facilitated* that fraud, those procedures could be considered in assessing Union Security's punishment. After all, the procedures employed by Pacific Mutual in *Haslip* did not contravene any Alabama statute.

a victim, it was a malefactor.

Finally, it is significant that Union Security took virtually no corrective action in response to the fraud in this case. In fact, Union Security's claims manager testified that Mrs. Crocker's claim was handled in "the normal way," R. 425; that he didn't see "anything wrong" with the way Union Security behaved, R. 425-26; and that no one was reprimanded, suspended, or received a citation as a result of the fraud. R. 427. Such lack of contrition made Union Security's misconduct all the more reprehensible.

d. Union Security next contends that there is insufficient evidence of mental anguish. Pet. 23. Union Security is wrong. At the time of the fraud, Mrs. Crocker was a 50-year-old woman who lived in a mobile home with her sixteen-year-old daughter. R. 562, 563. A disabled 25-year-old son lived nearby. R. 563. Mrs. Crocker worked part-time for the U.S. Postal Service. R. 564. Three weeks after her husband's death, Mrs. Crocker received a letter from Union Security — a company she "had never heard of," since it had never provided her with a written insurance policy, R. 580 — stating that "benefits are not payable" and her claim was being "investigated." R. 580. Mr. Taylor told her that "it looked like to him if it was investigated it should have been done when we took the loan out rather than after my husband died." R. 581. Ten days later, she received another letter misspelling her name and stating that Union Security would not pay benefits under the policy. R. 582. Mrs. Crocker told Mr. Taylor, "I need my money." R. 583. He advised her to retain a lawyer. R. 584.

Two months later, during the Christmas holiday season, Mrs. Crocker received a letter from the bank stating that her home mortgage loan payments were past due in the amount of $1,458.00 and threatening to refer the matter to the bank's attorneys unless she paid the past due amount within nine days.

R. 517-18, 584. At trial, Mrs. Crocker indicated that she understood the threat as involving foreclosure on her mobile home. R. 584. Mr. Taylor confirmed that he planned to tell the bank's lawyers to "initiate foreclosure proceedings" on Mrs. Crocker's home. R. 518.

Union Security tries to excuse this outrageous behavior by arguing that the bank could not really have evicted Mrs. Crocker under Ala. Code 1975 §§ 35-10-13, 35-10-16, because it would have been required to publish a foreclosure notice for three consecutive weeks. Pet. 21 n.18. Of course, Mrs. Crocker had no such knowledge of the details of Alabama mortgage law, nor apparently did Mr. Taylor. Their trial testimony indicated that the threat of foreclosure was intended to be real and was understood as such. The statute now cited by Union Security after the fact did not diminish by one iota the mental anguish suffered by Mrs. Crocker. Indeed, the statute simply shows that the threats of foreclosure were illegal as well as mean-spirited.

Union Security's further argument that the threat of foreclosure abated when Mrs. Crocker retained counsel, borrowed money, and began making the mortgage payments anew (Pet. 21 n.18) is equally beside the point. That the threat of losing her home did not in the end materialize hardly diminishes the mental anguish she suffered in the interim. And Union Security can hardly claim credit for Mrs. Crocker's self-help actions or the generosity of her trial counsel.

Union Security complains that there was no evidence that Mrs. Crocker was hospitalized, consulted a doctor or therapist, or was prescribed medication for her mental anguish. Pet. 22-23. But there is no federal constitutional reason why such evidence was necessary. The Alabama courts were surely entitled to draw on common human experience to infer that the mental anguish suffered by a 50-year-old recent widow of modest means facing

the imminent loss of her home was self-evident.[5] Under Alabama law, the assessment of damages for mental anguish "is left to the sound discretion of the jury, subject only to review by the court for a clear abuse of that discretion." *First Commercial Bank v. Spivey*, 694 So. 2d 1316, 1326 (Ala. 1997). As the trial court found, "[o]bviously, the jury, drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants." App. 30a-31a. The Alabama Supreme Court considered "the emotional and mental toll the wrongful conduct took upon her; that conduct led to her fight over insurance and caused her to face the threat of losing her home in foreclosure proceedings only months after losing her husband." App. 7a.

e. Union Security contends that "no fault could be laid at Union Security's door" for the threat of foreclosure because Taylor was "wearing solely his bank officer hat" when he made those threats to Mrs. Crocker. Pet. 21-22. Union Security points to no evidence in the record to substantiate its claim. In any event, Union Security is culpable because, at the time the credit life policy was extended, Taylor knew "that the Crockers were relying on the coverage to pay off the loan and prevent the foreclosure of their home mortgage in the event either of them died." App. 5a. This knowledge is of course to be imputed to the principal, Union Security.

It is plainly reasonably foreseeable that the harm in a case like this will not merely be financial: when credit life policies are

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[5] Mrs. Crocker testified that the events precipitated by the fraud caused her to be "upset," R. 587, but petitioner successfully objected to this testimony as "call[ing] for a mental operation and self-serving declaration on the part of the witness." R. 587. It is thus inconsistent for Union Security now to demand additional direct evidence of mental anguish, when it resisted such evidence at trial.

extended to persons of modest means — with the borrowers' residence as sole collateral — there is a substantial risk of catastrophic consequences if the borrowers are defrauded. As the trial court commented, "[t]he harm which resulted in this case . . . not only was [that] the loan, which was secured by a loan on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed." App. 33a. An insurance company in the business of selling credit life necessarily understands that, where policyholders are defrauded and deprived of the expected benefit of the bargain, and where the loan cannot be repaid, there is a possibility of grievous injury.

2. Ratio between punitive damages and actual harm. The Alabama Supreme Court explained that "we do not consider the compensatory damages to be based solely upon economic loss." App. 6a. Instead, "we have thoroughly reviewed the compelling evidence of Mrs. Crocker's emotional and mental distress over Union Security's misconduct, as well as her economic loss, in determining the possible ratio of punitive damages to compensatory damages." *Id.* The court noted that, in another recent case, a compensatory award of $500,000 was found appropriate for "mental and emotional distress arising from the defendant's fraudulent conduct that led to the foreclosure of the mortgage on the plaintiff's home." *Id.* at 7a. As Justice Houston elaborated, in this case Union Security's procedural default at trial means that the compensatory damages for mental anguish must be assumed to be $250,000, producing a modest 3:1 ratio between punitive and compensatory damages. App. 46a.

Thus, this case does not present any of the ratio concerns that this Court has encountered in the past. *See, e.g., BMW v. Gore*, 116 S. Ct. at 1603 (500:1 ratio "raise[s] a suspicious judicial eyebrow") (internal quotation omitted) ; *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443, 459-61 (1993)

(upholding 526:1 ratio between punitive and compensatory damages); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (upholding 200:1 ratio between punitive damages and out-of-pocket expenses); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (upholding ratio of punitive to compensatory damages over 100:1).

Instead, this case involves the same 3:1 ratio that this Court has noted is commonplace in federal statutes such as the antitrust and RICO laws. *See BMW v. Gore*, 116 S. Ct. at 1602 n.33. In fact, this case involves the kind of injury that this Court has indicated would warrant an unusually high ratio of punitive to compensatory damages: it involves "a particularly egregious act [that] has resulted in only a small amount of economic damages." *Id.* at 1602.

The Alabama Supreme Court specifically rejected Union Security's argument (recycled in its Petition) that Mrs. Crocker's economic losses fully reflected any harm she had suffered: "It is important to recognize that this economic injury was catastrophic for Mrs. Crocker in the wake of her husband's death; without his income to help make the loan payments to First Alabama, those benefits were all she had to keep from losing her home to foreclosure." App. 6a. Like other courts, the Alabama Supreme Court has repudiated Union Security's apparent view that "compensation" must be limited to solely economic damages. *See, e.g., Winn Dixie of Montgomery, Inc. v. Colburn*, 1998 WL 5313, *3 (Ala. Feb. 6, 1998).

Indeed, under *BMW* the nature of the damages in this case would warrant an even higher ratio than usual between punitive and compensatory damages. As the Alabama Supreme Court explained, the non-economic losses suffered by Evelyn Crocker — a woman of modest means — justify a high ratio:

The United States Supreme Court in *BMW* held that an

> economic loss to the plaintiff in that case, a well-to-do medical doctor, did not support a large punitive damages award; however, the Supreme Court was careful to point out that economic injury inflicted upon the "financially vulnerable" is an entirely different concern and "can warrant a substantial penalty." 116 S. Ct. at 1599. Where, as here, the economic harm could devastate its target, this is an especially serious consideration to be weighed against the amount of damages awarded. The Supreme Court also recognized in *BMW* that "[a] higher ratio [of punitive damages to compensatory damages] may . . . be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm [is] difficult to determine." 116 S. Ct. at 1602.

App. 6a-7a.

III. THE ALABAMA SUPREME COURT HAS NOT "DEFIED" THIS COURT'S MANDATE IN *BMW*

Union Security repeatedly raises the highly misleading charge that the Alabama Court has "affirmatively **refused** to apply the third *BMW* guidepost" and has "defied this Court's decision in *BMW*." Pet. 2 (emphasis in original); *see also id.* at 17 ("flagrantly flouted"); *id.* at 18 ("not heeded this Court's mandate"); *id.* at 25 ("flatly refused to apply the third *BMW* guidepost"); *id.* at 26 ("cavalier rejection of the third *BMW* guidepost").

This accusation is utter nonsense and highly insulting to the highest court of a sovereign State. Since the decision in *BMW*, the Alabama courts have faithfully applied the three guideposts outlined by this Court to review the excessiveness of punitive damage awards, supplemented by additional factors established

in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), and Ala. Code 1975, § 6-11-23(b).[6]

The *Hammond/Green Oil* factors show that the Alabama Supreme Court has gone *beyond* this Court's mandate in *BMW*. In this case, for example, the court cited two of the *Green Oil* factors — the financial position of the defendant and the cost of litigation— as important reasons to reduce the damage award. App. 8a-9a.

Post-*BMW* review of damage awards by the Alabama Supreme Court has been stringent:

• In this very case, the court cut the damage award by $1 million, or 50%.

• In the *BMW* case itself, the Alabama court reduced a $2 million award by 97.5% to $50,000. *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (Ala. May 9, 1997).

• In *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524 (Ala. Aug. 15, 1997), the Alabama Supreme Court reduced a punitive award by 40%, from $5 million to $3 million.

• In *Hillcrest Center, Inc. v. Rone*, 1997 WL 707069 (Ala. Aug. 1, 1997), the court reduced a punitive award of $130,000 — which had already been remitted by the trial judge from the jury's initial award of $200,000 — by a further 28%, to the sum of $96,000.

• In *American Pioneer Life Ins. Co. v. Williamson*, 1997 WL

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[6] The *Hammond-Green Oil* factors further constrain punitive awards, and they were specifically approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Nothing in *BMW* displaced them. Moreover, in his concurrence in *BMW*, Justice Breyer, joined by Justice O'Connor and Justice Souter, discussed these factors as a means of constraining damage awards. 116 S. Ct. at 1605-07 (concurring opinion). It was not the *Green Oil* factors themselves, but the particular application of them in the *BMW* case, that Justice Breyer found objectionable.

545880 (Ala. Sept. 5, 1997), the court reduced a $3 million punitive award by 75% to $750,000.

• In *Ford Motor Co. v. Sperau*, 1997 WL 545878 (Ala. Sept. 5, 1997), the Alabama Supreme Court reduced a punitive award by 70%, from $6 million to $1.792 million.

• In *Talent Tree Personnel Services, Inc. v. Fleenor*, 1997 WL 566228 (Ala. Sept. 13, 1997), the court reduced a punitive award from $2 million to $1.5 million.

• In *Strickland v. Liberty National Life Ins. Co.*, 1998 WL 57759 (Ala. Feb. 13, 1998), the court affirmed the reduction of a punitive award by over 99%.

Thus, the Eleventh Circuit has concluded that, "[s]ince *BMW*, the Alabama Supreme Court has shown itself willing and able to follow the Supreme Court's guidelines for ensuring that Alabama punitive damage awards satisfy constitutional constraints. . . . Indications are that the *BMW* decision has ushered in a new era for punitive damages in Alabama." *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 129 F.3d 1258, 1264 (11th Cir. 1997).

In this case, Union Security accuses the Alabama Supreme Court of refusing to apply the third *BMW* guidepost — statutory penalties for comparable misconduct. That accusation is utterly devoid of merit. In *BMW v. Gore*, this Court considered that the "maximum civil penalt[ies]" "that could be imposed" on comparable misconduct in order to ensure that the punitive award was consistent with "'legislative judgments concerning appropriate sanctions for the conduct at issue.'" 116 S. Ct. at 1603 (citation omitted).

At the outset, there can be no question that the 3:1 ratio between punitive and compensatory damages in this case is fully supported by legislative enactments in Alabama. Alabama has specifically provided a private treble damages remedy for victims of fraud: up to three times any actual damages, in the court's discretion, plus attorneys' fees. *See* Ala. Code 1975 § 8-19-

10(a)(2) and (3). A savings clause in the statute provides that the remedies under the Act do not displace remedies for fraud, misrepresentation, deceit, or suppression that are available under the common law, statute, or otherwise. *Id.* at § 8-19-15. Astonishingly, Union Security does not even cite this statutory provision in its certiorari petition. Thus, the ratio between punitive and compensatory damages in this case is fully consistent with the judgment of the Alabama legislature, and the award in this case thus plainly passes muster under the third *BMW* guidepost.

Union Security ignores this analysis and instead focuses its argument on language in the Alabama Supreme Court's opinion, rather than its judgment. But "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Further, Union Security misreads the Alabama court's opinion. The state court did not treat the third *BMW* guidepost as optional. Instead, it explained that "[a] third factor we *must* consider in determining whether the punitive damages award was excessive is the relationship of the punitive damages award to the civil or criminal penalties that could be imposed for comparable misconduct." App. 7a (emphasis added). Indeed, the Alabama Supreme Court has applied that factor to reduce punitive awards. *See, e.g., Talent Tree Personnel Services, Inc. v. Fleenor*, 1997 WL 566228, *11 (comparing penalties under fraud statute, Ala. Code 1975 § 13A-8-3).

In applying the third guidepost in this case, the Alabama court explained that "the maximum statutory sanction against insurance fraud in this state is meager" and does not provide a "'meaningful'" benchmark for reviewing damages claims. App. 7a-8a. This language reflects the recognition that the State of Alabama has decided to police insurance fraud through the tort system rather than via administrative regulation. *See Life*

Insurance Co. of Georgia v. Johnson, 701 So.2d 524, 531 (Ala. 1997) ("[T]he Alabama Insurance Code does not provide strong sanctions for insurance fraud. 'Alabama citizens who become the victims of fraud have little recourse other than through litigation. . . . [T]he State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have. Punitive damages have historically been part of the remedy for such victims . . . .'") (citation omitted).

Thus, the Alabama Supreme Court simpy recognized that the statutory sanction cannot be applied blindly, in a vacuum, without proper concern for the legislative purpose. This hardly represents "defiance" of *BMW*; in fact, it is perfectly consistent with *Haslip*, where this Court upheld a punitive damages award which greatly exceeded the fine that could be imposed for insurance fraud under Alabama law. This Court found the comparison between the punitive award and the statutory fine to be less than meaningful, because "[i]mprisonment . . . could also be required of an individual in the criminal context." 499 U.S. at 23.

There is even greater reason to respect the decision of a State's highest court as to the relevance of the State's own statutory enactments. How States allocate functions among the various branches of state government are unquestionably matters of state law. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6, 463 (1981); *id.* at 479 (Stevens, J., dissenting). Alabama is free to use its judiciary, rather than an administrative agency, as the primary regulator of insurance fraud. The States themselves are not bound by the federal doctrine of separation of powers, and nothing in the Constitution dictates how States must distribute their governmental powers. *E.g., Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring).

Accordingly, the Alabama Supreme Court was under no federal constitutional compulsion to make legislatively prescribed penalties for insurance fraud the decisive factor in its excessiveness analysis. However, the Alabama court *did* fulfill the command of *BMW v. Gore* by ensuring that the damage award was consistent with "'legislative judgments'" (116 S. Ct. at 1603 (citation omitted)), for the State of Alabama's decision to regulate insurance fraud through the tort system rather than administratively is one in which the legislature has acquiesced.

IV. FURTHER REVIEW OF THIS MUCH-PROLONGED CASE WOULD BE INAPPROPRIATE

This Court has already remanded this case once for reconsideration in light of *BMW v. Gore*. There is no reason for further delay. Union Security has already had *eight* separate opportunities to challenge the judgment before the Alabama courts: (1) an initial remittitur hearing before the Circuit Court for Choctaw County, Alabama, in which the court reduced the punitive award by 40%; (2) a subsequent proceeding before the circuit court, after a co-defendant settled with the respondent; (3) a full appeal on the merits before the Alabama Supreme Court; (4) a rehearing petition in the first appeal; (5) a denied application for stay in the first appeal; (6) plenary consideration before the Alabama Supreme Court in light of *BMW v. Gore*, on remand from this Court; (7) a second rehearing proceeding; and (8) a second denied application for stay.

There is a need for finality and closure, both for the litigants and for the state courts of Alabama, which have diligently implemented this Court's directive in *BMW v. Gore* and which should be allowed to function without undue interference.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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March 1998